MAR 31 1981
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner,

v.

LOUIS R. KOERNER, SR.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

Louis R. Koerner, Jr.
LAW OFFICES OF LOUIS R. KOERNER, JR.
A Professional Law Corporation
1204 Jackson Avenue
New Orleans, Louisiana 70130
(504) 566-0546

Counsel for Respondent

QUESTION PRESENTED FOR REVIEW

Should a credit card issuer be required to abide by the provisions of the 1974 Fair Credit Billing Act, 15 U.S.C. § 1666, before revoking the card of an individual who is liable as a principal on a business credit card, when the card is unrestricted as to use and has been used for mixed business and personal purposes?*

---

* Louis R. Koerner, Sr. and John E. Koerner & Company, Inc. have no parent companies, subsidiaries, or affiliates that are required to be disclosed pursuant to Rule 28.1 of the Rules of this Court, other than the following: Koerner Domestic Import Sales Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	(i)
TABLE OF AUTHORITIES	(iv)
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. PETITIONER HAS MISSTATED THE ISSUE PRESENTED TO THE COURT IN THE CASE AT BAR	8
II. RESPONDENT WAS SOLIDARILY LIABLE FOR THE DEBTS INCURRED ON HIS CREDIT CARD, AND WAS NOT MERELY A SURETY FOR JOHN E. KOERNER & COMPANY. . . .	10
III. CLASSIFYING CREDIT CARDHOLDERS WHO USE THEIR CARDS FOR BOTH PERSONAL AND BUSINESS PURPOSES AS CONSUMERS IS CONSISTENT WITH THE PROVISIONS OF THE ACT	17
IV. THE DECISION OF THE FIFTH CIRCUIT IS CONSISTENT WITH ALL PROPERLY REASONED PRIOR ADMINISTRATIVE INTERPRETATIONS.	24
V. THE OPINION OF THE FIFTH CIRCUIT IS CONSISTENT WITH THE JUDICIAL RULE OF LIBERAL CONSTRUCTION OF THE TRUTH-IN-LENDING ACT	33
VI. A "PROSPECTIVE PREDOMINANT USE" TEST WOULD BE UNWIELDY IN ITS APPLICATION, ACCORDINGLY THE BUSINESS EXEMPTION SHOULD NOT BE APPLICABLE TO EXEMPT	

TABLE OF CONTENTS -- Continued

PETITIONER FROM COMPLIANCE 37

VII. THE IMPACT ON CREDIT FOR BUSINESS ENTERPRISES WILL BE, AT MOST, MINIMAL AS A RESULT OF THE DECISION OF THE COURT OF APPEALS . . 52

CONCLUSION. 59

TABLE OF AUTHORITIES

CASES Page

Adema v. Great N. Dev. Co., 374 F. Supp. 318 (N.D. Ga.1973) 19

Allen v. Beneficial Finance Co., 393 F.Supp. 1382 (N.D.Ind. 1975). 18

American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974) . . . 27-30, 40-43, 46-48

American Indemnity Co. v. Robertson, 309 So.2d 737 (La. App. 4th Cir. 1975) . . . 12-13

Bonura v. Christiana Bros. Poultry Co. of Gretna, Inc., 336 So.2d 881 (La. App. 4th Cir. 1976), writ refused 339 So.2d 11, application not considered 339 So.2d 26 . . . 13

Central Bank v. Winn Farmers Co-operative, 299 So.2d 442 (La. App. 2nd Cir. 1974). 16

Credit Card Service Corp. v. FTC, 495 F.2d 1004 (D.C. Cir. 1974). 27-30, 40, 43-48, 50

Cunningham v. Hardware Mutual Casualty Co., 228 So.2d 700 (La. App. 1st Cir. 1969). 15

Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974). 33

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) . . . 25, 30, 33

Ford Motor Credit Co. v. Soileau, 323 So.2d 221, 225 (La. App. 3rd Cir. 1975). 15

Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979) 19, 31

In re Credit Card Service Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191 (1973), affirmed and enforced sub nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C.

TABLE OF AUTHORITIES -- Continued

Cir. 1974). . . 27-30, 40, 43-48, 50
Irvin v. Public Finance Co. of America, 340 So.2d 811 (Ala.Civ.App. 1976), cert. denied 340 So.2d 815. . . . 36
Johnson v. Jones-Journet 320 So.2d 533 (La. 1975). 15
Poe v. First National Bank of DeKalb County, 597 F.2d 895 (5th Cir. 1979) 19
Puckett v. Georgia Homes, Inc., 369 F.Supp. 614 (D.S.C. 1974) . . 19
Sapenter v. Dreyco, Inc., 326 F.Supp. 871 (E.D. La.), aff'd, 450 F.2d 941 (5th Cir. 1971), cert. denied, 406 U.S. 920 (1972) 19
Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975). 33
Smith v. Chapman, 436 F.Supp. 58 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980). . . 19
Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973). . . 33
Tower v. Home Const. Co. of Mobile, Inc., 458 F.Supp. 112 (S.D. Ala. 1978). 19
Vines v. Hodges, 422 F.Supp. 1292 (D.D.C. 1976) 19
Weingarten v. First Mortgage Co., 466 F.Supp. 349 (E.D. Pa. 1979) . 19

STATUTES AND REGULATIONS

Truth in Lending Act

15 U.S.C. § 1601. . . . . 8, 39, 50
15 U.S.C. § 1602(h) 22
15 U.S.C. § 1603. . . . . passim
15 U.S.C. § 1640. 34
15 U.S.C. § 1642-44 40

TABLE OF AUTHORITIES -- Continued

15 U.S.C. § 1666. . . . . passim

Louisiana Civil Code

Art. 2091 14
Art. 2094 15
Art. 2103 16
Art. 3035 et seq. 12

LEGISLATIVE MATERIALS

S. Rep. No. 392, 90th Cong., 1st Sess. 7 (1967) 9
S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972) 23
S.Rep.No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973) 23

ADMINISTRATIVE MATERIALS

Regulation Z:

12 C.F.R. § 226.2(m). 28
12 C.F.R. § 226.7(b)) 40

Public Information Letter No. 277, March 10, 1970, 5 CCH Consumer Credit Guide ¶ 30,318 26
Public Information Letter No. 663, January 23, 1973, 5 CCH Consumer Credit Guide ¶ 30,934 27
Public Information Letter No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045 . . 22, 27-30
Public Information Letter No. 751, January 14, 1974, 5 CCH Consumer Credit Guide ¶ 31,070 27
Public Information Letter No. 821, July 18, 1974, 5 CCH Consumer

TABLE OF AUTHORITIES -- Continued

Credit Guide ¶ 31,143 . . 27, 31, 52
Public Information Letter No. 1004, February 10, 1976, 5 CCH Consumer Credit Guide ¶ 31,338 . . . . . 25, 27, 32-32, 54

OTHER AUTHORITIES

Warren & Larmore, Truth in Lending: Problems of Coverage, 24 Stan. L. Rev.793 (1972) 9

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No. 80-202

AMERICAN EXPRESS COMPANY,
Petitioner

v.

LOUIS R. KOERNER, SR.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

Respondent, Louis R. Koerner, Sr., respectfully submits this, his Brief in response to the Brief for Petitioner in the above-styled action, and further respectfully prays that this Court affirm the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered April 7, 1980.

STATEMENT OF THE CASE

Contrary to the assertion of the American Express Company, the question presented by this case is not as broad as Petitioner would

have this Court believe. The question is not whether the Truth-in-Lending Act applies to business loans secured by an individual's personal liability.

Rather, the question presented by this case is whether a credit card issuer should be required to abide by the provisions of the 1974 Fair Credit Billing Act, 15 U.S.C. § 1666 before revoking the credit card of a natural person who has signed as jointly and severally liable for the business and personal debts incurred thereon, when the card is unrestricted as to use and has been used for mixed personal and business use.

The decision of the Court of Appeals will have absolutely no effect whatsoever upon the vast majority of business credit transactions in this country. It will merely require a credit card issuer, such as Petitioner, either to specify that a particular credit card may only be used for business purposes without liability on a "consumer" as principal, and thereby is exempted from the provisions of the Truth-in-Lending Act by application of 15 U.S.C. § 1603, or to follow the provisions of the Act for credit cards issued to individual consumers for personal or "mixed" use.

The facts which gave rise to the instant litigation are as follows. On November 16,

1965, the corporation, John E. Koerner & Company, Inc., [hereinafter referred to as "the Company"] made an "APPLICATION FOR CREDIT CARD | COMPANY ACCOUNT" to American Express [J.A. 27a]. In this application and in the "APPLICATION FOR SUPPLEMENTARY CREDIT CARD Company Account (Combined Billing)," signed the same day, the following statement was made:

> The undersigned individual and company join in this application and assume joint and several liability for all charges incurred prior to return of Credit Card to American Express Company. The applicants agree to be bound by the terms and conditions accompanying the Credit Card, if this application is accepted and a Credit Card issued [emphasis supplied].

J.A. 27a, 28a.

In the space marked "SIGNATURE OF INDIVIDUAL APPLICANT," the signature of John E. Koerner, Jr. was entered [J.A. 27a]. Also on November 16, 1965, Louis R. Koerner, Respondent herein, a company officer, completed a form labeled "Application for Supplementary Credit Card, Company Account." Respondent signed beneath and agreed to the same terms quoted above. The applications were approved, the account was opened, and cards were issued to and in the name of John E. Koerner, Jr. and to and in the name of Louis R. Koerner, Re-

spondent herein.

Respondent used the card for both personal and business purposes [J.A. 41a]. Although there was a single billing and all charges were billed to the Company, the bills contained itemized statements of the individual accounts. Mr. Koerner remitted payment directly to American Express for a number of non-business, consumer transactions with personal checks drawn on his own account. The last of these personal checks was dated September 2, 1976, the same month as the incident in question [J.A. 42a].

In 1975, a billing dispute arose over the following charges included on the combined statements sent to the company:

> (a) Three debits in the amount of $3.00 each and one debit in the amount of either $3.00 or $6.00 for charges made by Mr. Koerner in July, August, September, and October of 1975 for air flight insurance for trips conducted for business purposes.
>
> (b) A debit of $20.00 representing, according to Respondent, "a charge for Mr. John E. Koerner's card which was returned and for which credit was never given." This was a renewal fee for a card no longer desired.
>
> (c) A debit of $20.00, ultimately cancelled by a credit which Respondent asserted was "a charge for a card of Ralph E. Koerner." The nature of the charge has

not been established.

The dispute remained unresolved through September 28, 1976. On that date, Respondent was asked to speak by phone to a representative of American Express when he attempted to use his card for the purchase of an airline ticket at the New Orleans International Airport. Following the conversation with the representative, Mr. Koerner was presented with his credit card cut in two. The purpose of the trip for which the ticket was to be purchased was business related. However, there was no extension of credit because of the card revocation.

Respondent filed suit in November of 1976 against Petitioner, the American Express Company, alleging that Petitioner violated the provisions of 15 U.S.C. § 1666, in that it wrongfully revoked Respondent's credit card as a result of a billing dispute. Petitioner filed a Motion for Summary Judgment on the grounds that the statute, 15 U.S.C. § 1666, does not apply to transactions of a business or commercial nature pursuant to 15 U.S.C. § 1603. The United States Magistrate rendered his initial report, recommending that the Motion be granted. The District Court, the Honorable Edward J. Boyle, Sr., affirmed the

decision [444 F.Supp 334], and in so doing, dismissed other pendent state claims which were dependent upon federal jurisdiction under 15 U.S.C. § 1666.

Respondent filed a Motion for New Hearing and to Alter or Amend Judgment and/or for a New Trial, which motion was denied by District Judge Boyle on January 4, 1978.

On appeal, the Fifth Circuit Court of Appeals, Wisdom, J., reversed and remanded the case [615 F.2d 191 (5th Cir. April 7, 1980), Pet. App. 1a], holding that the provisions of the Truth-in-Lending Act dealing with the correction of billing errors and requiring that a credit card issuer take certain steps before restricting or closing a credit card account were applicable to an individual cardholder who was jointly and severally liable with his employer for the debts charged to the card.

The holding of the Fifth Circuit is limited to an interpretation of one section of the 1974 amendments to the Truth-in-Lending Act, 15 U.S.C. § 1666, and does not in any way threaten to disrupt the business credit transaction exemption that governs the broad range of commercial practices to which Petitioner refers. Such credit transactions are the subject of the original 1968 Truth-in-Lending Act, and nothing in the decision in the pre-

sent case nullifies the effect of the 15 U.S.C. § 1603 business and commercial exemption as it pertains to those transactions.

SUMMARY OF ARGUMENT

I.

Having joined in the application and assumed solidary liability for the personal and business debts incurred on the card, Louis R. Koerner was a principal debtor. He was not, as Petitioner has attempted to portray, merely a surety or continuing guarantor, for the Company. The use by Mr. Koerner of his credit card can not therefore be viewed as an extension of credit solely to John E. Koerner & Company.

II.

An individual cardholder who is liable as a principal for personal or mixed uses of his credit card should be classified as a consumer and be afforded the protections provided by the 1974 Fair Credit Billing Act.

III.

The classification of a natural person who is principally liable for both personal and business uses of his credit card is consistent with the definition of "consumer" as provided by the Truth-in-Lending Act, as well as with the judicial rule that the Act is to be construed liberally in favor of the consumer.

IV.

The decision of the Fifth Circuit Court of Appeals is consistent with all properly reasoned prior administrative interpretations.

V.

The effect of the Fifth Circuit's decision or of the application of 15 U.S.C. § 1666 to business credit cards unrestricted as to use will be minimal on the majority of business credit transactions in this country.

VI.

Any attempt to categorize the extension of credit on a credit card as business or personal by its "prospective predominant" or "predominant" use has been shown to be unwieldy and unworkable. Accordingly, the provisions of 15 U.S.C. § 1666 should be applicable to all credit card transactions, whether personal or business.

ARGUMENT

I. PETITIONER HAS MISSTATED THE ISSUE PRESENTED TO THE COURT IN THE CASE AT BAR

Like Petitioner, we begin our analysis with the language and the legislative history of the Truth-in-Lending Act. The specific purpose of the original Act, as stated in 15 U.S.C. § 1601, is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the

various credit terms available to him and avoid the uninformed use of credit." Because the Act was designed as a consumer protection statute, exemptions were allowed for corporate debtors and individuals who secure credit for business or commercial purposes. These debtors were thought to be amply sophisticated to make informed judgments as to the value of alternative credit plans and to be able to negotiate beneficial credit terms, so as not to require the special disclosure protections provided by the Act. See, Warren & Larmore, Truth in Lending: Problems of Coverage, 24 Stan. L. Rev. 793, 809-10 (1972). The Report of the Senate Committee on Banking and Currency states in pertinent part:

> Most businesses or corporations are in a good position to judge the relative worth of alternative credit plans and by and large do not require the special disclosure protection provided by the bill.

S. Rep. No. 392, 90th Cong., 1st Sess. 7 (1967).

Accordingly, 15 U.S.C. § 1603 exempted "credit transactions involving extensions of credit for business or commercial purposes or . . . to organizations [defined to include corporations and partnerships]." This exemption remains in full force insofar as it concerns the provisions of the 1968 Act. In

the instant case, Respondent in no way challanges the effect of this exemption upon the vast majority of business credit transactions.

Contrary to the assertion of the American Express Company that the Fifth Circuit opinion would apply the provisions of the Truth-in-Lending Act to every extension of credit for which an individual may be liable, the scope of the case at bar and of the decision of the Fifth Circuit is strictly limited to an interpretation of one section of the 1974 amendments to the Truth-in-Lending Act, specifically 15 U.S.C. § 1666, the amendment dealing with the settlement of billing disputes in credit card transactions. For the reasons discussed below, the Fifth Circuit opinion was well-considered, and the effect of the decision on business credit transactions in the United States will be minimal, at most.

II. RESPONDENT WAS SOLIDARILY LIABLE FOR THE DEBTS INCURRED ON HIS CREDIT CARD, AND WAS NOT MERELY A SURETY FOR JOHN E. KOERNER & COMPANY

Throughout this litigation, the American Express Company has attempted to categorize Mr. Koerner as a surety or guarantor of the debts of John E. Koerner & Company. American Express has consistently argued that the Company was ultimately responsible for any debts

incurred upon the credit card. See, e.g., J.A. 25a and 26a; Pet. App. 10a.

By arguing that Respondent was merely a surety for the Company and thus that the Company alone assumed primary responsibility for the debts incurred on the card, Petitioner could then attempt to draw the conclusion that the debts must be "extensions of credit for business or commercial purposes" and therefore argue that they are not subject to the provisions of 15 U.S.C. § 1666 because of application of the business or commercial exemption. Such a characterization of the relationship between the company and Respondent is not accurate, as the Fifth Circuit indicated in its opinion [Id.] Accordingly, the characterization of the purpose for which the card was used is also not as simplistic as Petitioner would have this Court believe.

Respondent joined in the application for the credit card and assumed "joint and several liability" for all debts incurred. By so doing, Respondent became a principal debtor of the Petitioner, with the consequent legal ramifications discussed below.

As is set forth hereinafter, Louisiana law distinguishes the legal consequences of suretyship and in solido liability.

The Louisiana Civil Code articulates the

nature and extent of suretyship in La. C.C. Art. 3035 et seq. Article 3035 provides as follows:

> Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not. [Emphasis added]

La. C.C. Art 3035. The language of Article 3035 and the cases which have applied it clearly indicate that the surety is but secondarily liable on the debt of the principal debtor, and need only satisfy the debt if the principal debtor does not. In American Indemnity Co. v. Robertson, 309 So.2d 737 (La. App. 4th Cir. 1975), the Louisiana Court of Appeals wrote:

> This fundamental principle of suretyship is embodied in LSA -- C.C.P. Article 2124, the pertinent part of which provides:
>
> A suspensive appeal bond shall provide, in substance, that it is furnished as security that the appellant will prosecute his appeal, that any judgment against him will be paid or satisfied from the proceeds of the sale of his property, or that otherwise the surety is liable for the amount of judgment. [Emphasis supplied by Robertson Court].

Id. at 738.

Continuing its analysis of the nature of suretyship, the Fourth Circuit Court of Ap-

peals of Louisiana wrote:

> [LSA -- C.C.P. Article 2124] is consistent with the codal provision which states that no suit shall be instituted against any surety on any appeal bond "until the necessary steps have been taken to enforce payment against the principal." LSA -- R.C.C. Article 3066. . . .
>
> * * * *
>
> . . . a surety becomes liable only where it is shown that there is insufficient property of the debtor to satisfy execution.
>
> * * * *
>
> . . . The surety . . . is not bound to pay until all of the property, both personal and real, of the judgment debtor is first exhausted. William D. Seymore Co. Inc. v. Castell, 13 La.App. 365, 125 So. 896 (Orl. App. 1930).

Id. at 738-39.

Similar analysis has been given to the relationship of a principal debtor to a continuing guarantor. In Bonura v. Christiana Bros. Poultry Co. of Gretna, Inc., 336 So.2d 881 (La. App. 1976), writ refused 339 So.2d 11, application not considered 339 So.2d 26, the Court unequivocally stated:

> [A] contract of continuing guaranty is equivalent to a contract of suretyship. See Brock v. First State Bank & Trust Co., 187 La. 766, 175 So. 569, 570 (1937). As such, rights and obligations arising from it are accessory to the principal obligation. LSA -- R.C.C. 3035.

336 So.2d at 884.

Were the relationship between the company and Mr. Koerner one of principal debtor/surety or principal debtor/continuing guarantor, as Petitioner would like the relationship to be characterized, it could be contended that, as the sole principal debtor, the company applied for and was issued a credit card solely for business purposes. According to such an analysis, the exemption of 15 U.S.C. § 1603 would then be triggered, and the provisions of 15 U.S.C. § 1666 would not apply. As the Fifth Circuit noted below, however, the relationship between the company and Respondent was not one of principal debtor/surety, but was one of solidary liability. By assuming solidary liability, Respondent himself became a principal debtor of the Petitioner.

The Louisiana Civil Code provides, in Article 2091, that:

> There is an obligation in solido on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor.

La. C.C. Art. 2091. Although Louisiana Civil Law employs the term "in solido" liability instead of the common law term "joint and several" liability, the two terms are synonymous in Louisiana for the purpose of classification

of the obligation as one "in solido." In Johnson v. Jones-Journet, 320 So.2d 533 (La. 1975), the Louisiana Supreme Court explained that "[i]n Louisiana, the common law term 'joint and several' is considered synonymous with the civil law term 'in solido'." Id. at 536. See also id. at n. 13, and Ford Motor Credit Co. v. Soileau, 323 So.2d 221, 225 (La. App. 3rd Cir. 1975).

When Louisiana debtors are liable in solido, the creditor may recover the entire debt from any one of the debtors. As Article 2094 of the Louisiana Civil Code provides:

> The creditor of an obligation contracted in solido may apply to any one of the debtors he pleases, without the debtors having a right to plead division.

La. C.C. Art. 2094. Louisiana jurisprudence has uniformly held that the creditor has the choice of which of his solidary debtors he will collect the debt from, since all solidary debtors are liable to the creditor for the entire debt. In 1969, the First Circuit Court of Appeals of Louisiana, in Cunningham v. Hardware Mutual Casualty Co., 228 So.2d 700 (La. App. 1st Cir. 1969), stated:

> Liability in solido, whether emanating from tort or contract, means that either of the debtors may be required to discharge the obligation in full at the creditor's election. La. R.C.C. Articles

2094 and 2103. [Emphasis in the original].

Id. at 705.

The Second Circuit Court of Appeals of Louisiana approached the question from the debtor's perspective when, in Central Bank v. Winn Farmers Co-operative, 299 So.2d 442 (La. App. 2nd Cir. 1974), it wrote:

> By its very nature contractual solidary liability deprives the obligors of the right to claim benefits of the remedy of division, which requires the obligee to divide his claim against the debtors and collect as if each of the debtors was liable only for his virile [proportional] portion.

Id. at 445.

The facts of the case at bar clearly show that Respondent was solidarily liable for the debts incurred on his credit card, and was not merely a surety for the Company, as Petitioner has argued. As such, American Express could elect to recover any and all debts incurred on the credit card directly from Mr. Koerner, without Respondent being able to plead division. To be sure, Mr. Koerner could sue the Company for contribution under La. C.C. Article 2103 for any business expenditures, or could have signed some form of repayment agreement with the Company. However, as the Fifth Circuit noted below, the ability of Re-

spondent to recover his payments from the Company depended upon the existence of an agreement between them and the company's continued solvency. It in no way affected the right of American Express to recover its debt directly from Respondent upon its own election.

Whatever the rule in Common Law jurisdictions, in Louisiana, at least, Mr. Koerner was a principal and not merely a surety.

Having determined therefore that Respondent, on account of the Civil Law concept of obligations in solido, was primarily liable for the debts incurred on his credit card, it becomes evident that the transactions involved herein cannot be classified merely as extensions of credit to a business to be contended to be exempt from the Truth-in-Lending Act by application of 15 U.S.C. § 1603. The credit card transactions were, at best, extensions of credit to an individual -- an individual consumer, as we shall soon explain -- and as such, do not immediately fall into the exemption category of credit transactions without further examination. That examination is the subject of Part III below.

III. CLASSIFYING CREDIT CARDHOLDERS WHO USE THEIR CARDS FOR BOTH PERSONAL AND BUSINESS PURPOSES AS CONSUMERS IS CONSISTENT WITH THE PROVISIONS OF THE ACT.

Petitioner frames the issue in this case,

and indeed spends the major portion of its Brief arguing that the exemption to the Truth-in-Lending Act for business or commercial debts applies to individuals who secure credit for business or commercial purposes. As stated earlier, the question here presented is not as broad as Petitioner contends. The problem which arises in this case results from the difficulty in isolating the "credit transaction" in the context of the credit card amendments, and then categorizing that "credit transaction" as either business or personal.

The penultimate question, before deciding whether or not the 15 U.S.C. § 1603 exemption could apply in a given case, is whether an individual who secures credit, through the use of a credit card, for both personal and business uses should be considered a consumer within the meaning of 15 U.S.C. § 1666, or a business debtor within the contemplated limits of the business or commercial exemption. Respondent contends, and the Fifth Circuit below held, that Mr. Koerner should be considered a consumer, and thereby be entitled to the protection provided by the 1974 Fair Credit Billing Act.

Because of the narrowness of the issue presented by this case, the cases cited by Petitioner for the proposition that the busi-

ness or commercial exemption may apply to individuals are inapposite. These cases deal with extensions of credit which are, without dispute, contemplated by the 1968 Act, such as commercial loans, Poe v. First National Bank of DeKalb County, 597 F.2d 895 (5th Cir. 1979), Weingarten v. First Mortgage Co., 466 F.Supp. 349 (E.D. Pa. 1979); mortgages for the acquisition or improvement of commercial property, Adema v. Great N. Dev. Co., 374 F.Supp. 318 (N.D. Ga. 1973), Puckett v. Georgia Homes, Inc., 369 F.Supp. 614 (D.S.C. 1974), Sapenter v. Dreyco, Inc., 326 F.Supp. 871 (E.D. La.), aff'd, 450 F.2d 941 (5th Cir. 1971), cert. denied, 406 U.S. 920 (1972), Tower v. Home Const. Co. of Mobile, Inc., 458 F.Supp. 112 (S.D. Ala. 1978); or, with extensions of credit not usually so contemplated, such as loans for the purchase of personal automobiles, Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979), Smith v. Chapman, 436 F.Supp. 58 (W.D. Tex. 1977), aff'd, 614 F.2d 968 (5th Cir. 1980), Vines v. Hodges, 422 F.Supp. 1292 (D.D.C. 1976).

The credit transactions involved in the cases cited by Petitioner (none of which involved credit cards) were, in general, easily classified as transactions for business or commercial purposes, or as transactions for

"personal, family, household, or agricultural purposes," and, as part of the 1968 Act, were exempted by 15 U.S.C. § 1603 when classified as the former. Were credit card transactions easily classified as "extensions of credit for business or commercial purposes" or as transactions for "personal, family, household, or agricultural purposes," there would be no dispute and, indeed, this case would not be currently before this Court. However, the uniqueness of credit card usage to credit transactions generally makes easy classification elusive.

A bright line rule is needed which would prevent the harassment of consumers by credit card issuers, thereby giving meaningful effect to the intent of Congress in enacting the 1974 amendments, and which, at the same time, would avoid the needless uncertainty and considerable litigation brought on by the adoption of a predominant use test. One such rule, which would preserve the personal/business dichotomy of 15 U.S.C. § 1603 as to credit cards, would require credit card issuers to restrict the use of certain credit cards to business or commercial purposes. All credit cardholders whose cards are not so restricted, who therefore use or could use their cards for solely personal, or for both personal and business

purposes, and who are liable "in solido" or as a principal, would be classified as consumers under the provisions of 15 U.S.C. § 1666, and would thus be accorded its protections.

The Fifth Circuit Court of Appeals based its decision on the narrow ground that, because Respondent had joined in the application and had assumed joint and several [in solido] liability for the debts incurred on the card, he was a principal debtor, as well as a consumer. Since Petitioner could recover its debts [including consumer debts] directly from a consumer, the Court of Appeals held that the Petitioner must abide by the provisions of the Truth-in-Lending Act regulating the correction of billing errors in a consumer's credit card statement. As the Fifth Circuit observed, "The credit card company cannot have it both ways: If it does not want to be bound by consumer lending requirements, then it should not be allowed to collect its debts from a consumer." 615 F.2d at 195-96, Pet. App. 10a.

The classification by the Fifth Circuit of Mr. Koerner as a consumer is not haphazard, nor is the term "consumer" synonymous with the term "individual." "Consumer" has a specific definition within the framework of the Truth-in-Lending Act. The definitional section of the Act states:

> The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

15 U.S.C. § 1602(h).

Respondent contends, and the Fifth Circuit agreed, that Mr. Koerner properly should be classified as a consumer within the meaning of 15 U.S.C. § 1602(h). Regarding the first part of the definition -- that the party to whom credit is extended be a "natural person" -- Respondent has demonstrated that, by joining in the application and assuming "joint and several liability" for any debts incurred on the card, he became a principal debtor to Petitioner. As a principal debtor and a natural person, Respondent clearly fits within the first part of 15 U.S.C. § 1602(h). See also Public Information Letter No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045, Pet. App. 3g.

Regarding the second portion of the definition -- that the money, property, or services which are the subject of the transaction be primarily used for personal, family, household, or agricultural purposes -- many of the

uses of the card were for just such purposes [J.A. 42a-43a]. Mr. Koerner dealt directly with American Express with respect to many of the transactions, remitting payments accepted by American Express by means of personal checks drawn on his own account even as late as the same month as the wrongful revocation.

The Court of Appeals recognized that its decision prevented application of the business exemption of 15 U.S.C. § 1603 to 15 U.S.C. § 1666 when a consumer is liable for both personal and business uses of the card, but stated that this result is in consonance with the purpose of the Fair Credit Billing Act of 1974 -- protecting consumers from the harrassment of creditors. See S.Rep. No. 278, 93d Cong., 1st Sess. 1-2, 4-6 (1973); S.Rep.No. 750, 92d Cong., 2d Sess. 1-4 (1972).

While the Court of Appeals may not have wished to resolve the issue of whether corporate transactions and transactions for business or commercial purposes are protected by the 1974 amendments dealing with credit cards, its decision protecting individuals who may be liable for "mixed" debts incurred on their credit cards was the minimum appropriate solution. It is the individual consumer who is subjected to the harrassment and embarrassment which the amendments are designed to prevent.

The proper method of protecting the consumer from such harrassment is to apply the protections of 15 U.S.C. § 1666 to any individual who is personally liable, as a principal, for both personal and business debts incurred on the card.

The Fifth Circuit's classification of Mr. Koerner as a consumer within the language of the Truth-in-Lending Act was correct, in light of the fact that he was principally liable for any personal debts (his capacity vis-à-vis American Express to incur them being unlimited), as well as business debts incurred on his card. If the business exemption is to apply at all to the 1974 credit card amendments, it should be applied only to those cards which have been restricted solely to use for business purposes. Such a rule of decision would set up a simple and straightforward test, which would be non-technical and easily understood when disclosed, and which could be applied in all situations with a minimum of difficulty.

IV. THE DECISION OF THE FIFTH CIRCUIT IS CONSISTENT WITH ALL PROPERLY REASONED PRIOR ADMINISTRATIVE INTERPRETATIONS

The Fifth Circuit did not apply § 1666 to all credit cards. Therefore, the contention of a conflict with prior administrative inter-

pretations of § 1666 and § 1603 is without merit.

This false issue is raised by the American Express Company as the contention [Brief for Petitioner 25 and n. 25] that the Court of Appeals violated the holding of this Court in Ford Motor Credit Company v. Milhollin, 444 U.S. 555 (1980), by disregarding a Federal Reserve Board staff opinion which stated that the Truth in Lending Act would not apply to a business card for solely business credit, i.e. No. 1004, February 10, 1976, infra.

While the Fifth Circuit recognized that the interpretive letter should be given great weight, however, the Court of Appeals found that the Federal Reserve Board regulations and the language of § 1666 supported a position that § 1666 should apply to transactions for business or commercial purposes or transactions involving extension of credit to corporations [Pet. App. 9a]. In light of the practical difficulties in formulating a test for classifying a particular credit card as either for business or personal use, the Court found the conflicting interpretations weighed in favor of protecting all individuals who may be liable for the debts incurred on their credit cards, regardless of the purpose of use.

However, after this detailed analysis and

the foregoing conclusion in dicta, the Court of Appeals declined to base its decision on this reasoning, but on a narrower ground.

> Koerner signed a statement joining in the application and assuming joint and several liability for any debts. Therefore, American Express could recover from him or from the company. If it can recover from a consumer, then it must abide by the requirements of § 1666 for correction of billing errors in a consumer's credit card statement. The credit card company cannot have it both ways: If it does not want to be found by consumer lending requirements, then it should not be allowed to collect its debts from a consumer.

Pet. App. 9a-10a.

American Express seems to misapprehend the actual holding of the Court of Appeals, and still seeks to battle the windmill of application of § 1666 to all credit cards.

A careful examination of the six letters cited by Petitioner reveals that the actual decision of the Court of Appeals is consistent with every one of the Public Information Letters of the Federal Reserve Board (reprinted in Pet. App. 1g, et seq.), as follows:

1. No. 277, March 10, 1970, 5 CCH Consumer Credit Guide ¶ 30,318 (Pet. App. 1g) involved a corporate customer and a corporate business loan but with an individual surety. Clearly this would be excluded by the test of the Court of Appeals because of the lack of a consumer as principal. Accordingly, this letter is consistent.

2. No. 663, January 23, 1973, 5 CCH Consumer Credit Guide ¶ 30,934 (Pet. App. 2g) involved a commercial loan secured by personal antiques. In that situation, there was no consumer liabililty whatsoever, and this letter provides no guidance.

3. No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045 (Pet. App. 3g) see discussion hereinafter. The date of this letter is incorrectly set forth in the Brief for Petitioner as November 13, 1975 (p. 15), although it is correctly dated at Pet. App. 3g and in the table of Authorities of Petitioner.

4. No. 751, January 14, 1974, 5 CCH Consumer Credit Guide ¶ 31,070 (Pet. App. 4g) involved a loan for the husband's exclusive business purposes, but secured by the family home. Since there was no consumer liabililty whatsoever, this letter is not applicable.

5. No. 821, July 18, 1974, 5 CCH Consumer Credit Guide ¶ 31,143 (Pet. App. 5g), see discussion hereinafter.

6. No. 1004, February 10, 1976, 5 CCH Consumer Credit Guide ¶ 31,338 (Pet. App. 7g), see discussion hereinafter.

Public Information Letter No. 727, November 13, 1973, 5 CCH Consumer Credit Guide ¶ 31,045, preceded American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974) and In re Credit Card Service Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191, 209-11 (1973), affirmed and enforced sub

nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C. Cir. 1974). Its suggestion of a "predominant use" examination is inconsistent not only with these cases but with the contention of the American Express Company that the 1970 Amendments applied to all credit cards, business or consumer [Brief for Petitioner 24-25]. However, the letter is interesting because it involves a credit card agreement with the same language as that involved in the present case, to wit: "both the employer and the employee are jointly and severally liable on all obligations incurred under the account."

The specific question posed was whether a periodic billing statement, involving § 226.7(b) of Regulation Z, issued under the 1970 Fair Credit Billing Act required the issuer to send a periodic billing statement to the employee as well as to the employer (which is an available option from American Express, Brief for Petitioner 40). This is, of course, a section different from that involved in the present case. Periodic billing is part of the "extension of credit," while Remis, supra, Credit Card Services Corp., supra, and the present case involve portions of the Fair Credit Billing Act governing obligations of the issuer in situations other than those

involving the extension of credit.

The language of the letter is in basic agreement with the Fifth Circuit's determination that the language of Petitioner's credit card agreement constituted the granting of credit to both the employer and consumer as joint principals. As stated by the author of the letter:

> The key question seems to be to whom credit is extended, and whether it is "consumer credit" as opposed to business credit.

The letter then pin points the issue considered by the Court of Appeals in the present case, by the Second Circuit in Remis, and by the D.C. Circuit in Credit Card Services, to wit: "if credit is extended to the employee as well as the company, the question arises as to whether the credit is for business or commercial purposes, or whether it is primarily for personal, family, household, or agricultural purposes." This is because "if the purpose of the credit is mixed but primarily for personal, family, household or agricultural purposes, the credit would be subject to the Truth in Lending's provisions."

The final paragraph begins: "If the account does fall within the disclosure provisions of the Regulation, . . .," but does

not provide resolution of the issue of determining "predominant" personal use. This letter was issued prior to the 1974 Amendments and prior to rejection of the "predominant use" test by Remis, supra, and Credit Card Services, supra. Moreover, the writer clearly does not understand American Express's contention, discussed, infra, that the 1970 Amendments were intended to cover all credit cards, including business cards.

This letter provides support for the determination by the Court of Appeals that Mr. Koerner was a "consumer" to whom credit was extended and does not support the position taken by American Express that Mr. Koerner was merely a surety owed no consumer duties. In the absence of an administrative resolution of the issue that is contrary to the position taken by the Fifth Circuit, this letter does not rise to Milhollin status. Furthermore, a consideration of the very issue under the 1974 Amendments should be no different. According to American Express,

> [T]he language, legislative history, and administrative construction of the 1970 amendments all show that Congress intended for the 1970 amendments to apply to all credit cards, not just those issued for consumer credit purposes. [Brief for Petitioner 24-25].

Since the foregoing adminstrative inter-

pretation rationally established the status of Mr. Koerner as that of a "consumer" and an "obligor," who is a natural person, then No. 821, July 18, 1974, 5 CCH Consumer Credit Guide ¶ 31,143 provides additional positive support to the position of the Court of Appeals. This letter discusses the business exemption as applied to a non-credit card situation -- there to a single securities "transaction" with an individual.

> It is difficult to draw a clear line between credit for personal, family, household, or agricultural purposes and credit for business or commercial purposes where the obligor is a natural person. In situations where there is an element of doubt as to what course to follow, it would seem to be in a creditor's interest to err on the side of making unnecessary disclosures rather than risk the possible consequences of failing to make them.

Compare, Gallegos v. Stokes, 593 F.2d 371 (10th Cir. 1979).

This is precisely the holding of the Court of Appeals. In its business dealings with Mr. Koerner and others, American Express disregarded compliance for its own reasons and at its risk and peril.

The final letter cited by Petitioner, No. 1004, February 10, 1976, 5 CCH Consumer Credit Guide ¶ 31,338 actually discusses the 1974 amendments. Your Honors will note, however,

how none of the elements considered important by Judge Wisdom were present in the question posed to the Federal Reserve Board.

1. The issuer contracted with the company cardholder only (no consumer as "solidary obligor");

2. The cards are used by employees of the company to purchase goods or services required for the performance of their job (no mixed or personal use, but only business use);

3. The cardholder is liable for payment, not the employee (the issuer cannot collect from either the cardholder or the employee, or from the employee at all).

This fact situation totally fails to meet the criterion established by the Fifth Circuit. Therefore, the letter's conclusion, as follows, is totally in accordance with the decision of the Fifth Circuit, to wit:

> It is the opinion of staff, based on the fact situation outlined, that the requirements of Fair Credit Billing do not apply to card issuers in relation to corporate cardholders using the cards for business or commercial purposes.

Petitioner makes the further contention that a proposed revision of Regulation Z, first broached in 1980, and supposedly affirming the foregoing ruling of the Federal Rule Board staff, is entitled to decisive weight. Since this ruling is not contrary to the de-

cision of the Court of Appeals, such an allusion simply begs the question.

In the absence of any contrary administrative interpretation involving the situation in which the issuer attempts to "have its cake and eat it too.", Milhollin is not applicable.

V. THE FIFTH CIRCUIT OPINION IS CONSISTENT WITH THE JUDICIAL RULE OF LIBERAL CONSTRUCTION OF THE TRUTH-IN-LENDING ACT.

United States courts have uniformly held that the provisions of the Truth-in-Lending Act should be construed liberally in favor of the consumer. In 1974, in a case entitled Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974), the Court of Appeals for the Ninth Circuit wrote:

> The Truth in Lending Act is a remedial statute designed as much as possible to permit borrowers to make informed judgments about the use of credit. To effectuate this congressional purpose requires that the Act's terms be liberally construed. See N.C. Freed Co. v. Board of Governors, 473 F.2d 1210, 1214 (2d Cir.), cert. denied 414 U.S. 827, 94 S.Ct. 38 L.Ed. 2d 61 (1973) [sic]; Gardner & North Roofing & Siding Corp. v. Board of Governors, 150 U.S. App. D.C. 329, 464 F.2d 841 (1972).

Id. at 650.

The Fifth Circuit Court of Appeals has also held that the Truth-in-Lending Act should be construed liberally. In Thomas v. Myers-

Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973), the Court awarded the plaintiff attorney's fees for an action brought under 15 U.S.C. § 1640, as well as for the work which her attorney performed on the appeal. Reconciling the judgment with the provisions of the Truth-in-Lending Act, the Court stated in its conclusion:

> The result we reach today is consistent with the statute's goals of creating a system of "private attorney generals" who will be able to aid the effective enforcement of the Act. Section 1640 is intended to allow aggrieved consumers to participate in policing the Act, . . . and its language should be construed liberally in light of its broadly remedial purpose. The domain of consumer credit with its allied commercial practices is no longer in the laissez faire era of caveat emptor. That doctrine is increasingly relegated to its proper place as a historical relic without modern application. The regulatory scheme forcefully expounds an emerging ethic of "caveat vendor," and we will not strain to avoid giving effect to the Federal Consumer Credit Protection Act.

Id. at 748. The Fifth Circuit reaffirmed its position in Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975), wherein it stated that "we have held that the Truth-in-Lending Act is to be construed liberally in favor of the consumer." Id. at 122.

The same analysis used by the Fifth Cir-

cuit has also been adopted by United States district courts throughout the country. In Allen v. Beneficial Finance Co., 393 F.Supp. 1382 (N.D.Ind. 1975), wherein the district court refused to grant the defendant's motion for summary judgment, the court analyzed the purpose and proper construction of the Truth-in-Lending Act.

> The Truth in Lending Act was designed to provide for mandatory disclosure requirements upon those institutions who extend credit to consumers. The purpose was to assure meaningful disclosure of the cost of credit so that consumers could compare various credit terms and avoid the uninformed use of credit. 15 U.S.C. § 1601. The Truth in Lending Act reflects a transition in Congressional policy from a philosophy of let-the-buyer-beware to one of let-the-seller-disclose. See Mourning v. Family Publication Service, Inc., 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973). . . . To effectuate this congressional purpose requires that the act's terms be liberally construed. Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir. 1974)] at 650; Scott v. Liberty Finance Co., 380 F.Supp. 475 (D.C.Neb. 1974); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971 (5th Cir. 1974); Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975).

Id. at 1384.

Similarly, state courts have adopted a rule of construction favorable to consumers. One of the most articulate statements was made by the Court of Civil Appeals of Alabama in

Irvin v. Public Finance Co. of America, 340 So.2d 811 (Ala.Civ.App. 1976), cert. denied 340 So.2d 815.

> Courts have taken to heart the purpose of the Act, stating both that it is to be liberally construed in favor of the consumer, Hannon v. Security Nat. Bank, 537 F.2d 327 (9th Cir. 1976); Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975); Gerasta v. Hibernia Nat. Bank, 411 F.Supp. 176 (E.D.La. 1975); Allen v. Beneficial Finance Co., 393 F.Supp. 1382 (N.D.Ind. 1975), and also that it is to be strictly enforced. Redhouse v. Quality Ford Sales, Inc. 511 F.2d 230 (10th Cir. 1975); Powers v. Sims and Levin Realtors, 396 F.Supp. 12 (E.D.Va. 1975).
>
> In a similar vein, numerous instances exist where the court, though stating that the violation is somewhat technical in nature, declares that the lender has not complied with the strict terms of the Act and is therefore liable for the penalty provided therein. Pennino v. Morris Kershman & Co., 526 F.2d 367 (5th Cir. 1976); Powers, supra. In short, the Act "reflects a transaction [sic] in Congressional policy from a philosophy of 'let-the-buyer-beware' to one of 'let-the-seller-disclose.'" Allen, supra, at 1384.

Id. at 813.

Many more courts, at all judicial levels, have also adopted the liberal rule of construction for application of the provisions of the Truth-in-Lending Act. The Fifth Circuit decision in the instant case, therefore, is

consistent with the uniform adoption of the rule of liberal construction.

If the use of the Respondent's credit card had been restricted solely to business use, Petitioner might at least be able to argue that the business exemption could apply. On the other hand, if the Respondent had used the card solely for personal use, there would be no question as to the application of the Fair Credit Billing Act. The issue of classification arises when the use of the card is mixed, being partially used for personal purposes and partially used for business purposes. In the absence of a workable test for determining the "predominant use," and in view of the rule of liberal construction of the Act in favor of consumers, the Fifth Circuit's inclusion of Respondent in the class of consumers protected by the Act is well-considered and sound. To do otherwise would undermine the purpose on Congress in enacting the Truth-in-Lending Act.

VI. A "PROSPECTIVE PREDOMINANT USE" TEST WOULD BE UNWIELDY IN ITS APPLICATION, ACCORDINGLY THE BUSINESS EXEMPTION SHOULD NOT BE APPLICABLE TO EXEMPT PETITIONER IN THIS CASE FROM COMPLIANCE WITH 15 U.S.C. § 1666

There are three additional alternative bases for affirmance of the decision of the Court of Appeals under the facts of this case, to wit:

1. 15 U.S.C. § 1666 should be applied to all business and commercial transactions because of the lack of an extension of credit in revocation situations and on account of the lack of any test to determine whether or not there is any "predominant use" of the credit card.

2. 15 U.S.C. § 1666 should be applied to Respondent because the Truth-in-lending laws were not in effect at the time of the Application, and any retroactive determination of prospective "predominant use" to the time of the Petitioner's Application would be a fiction at best.

3. 15 U.S.C. § 1666 should be applied to Respondent because the American Express Company made no attempt to ascertain whether or not the usage of the card was for any purpose other than for personal use, accepted personal funds from Respondent, and took no steps to restrict the use of the card to business purposes.

1.

General Applicability of 15 USC § 1666

Although the Court of Appeals did not decide whether the business exemption should be applied to the 1974 amendments dealing with credit cards, terming the issue "obviously difficult" (Pet. App. 9a), both judicial and administrative interpretations, as well as the legislative history, of these amendments lead to the conclusion that the exemption for

business and commercial transactions allowed under 15 U.S.C. § 1603 should not apply to the 1974 amendments.

When Congress enacted the Truth in Lending Act in 1968, the original Act contained no provisions regarding credit card transactions, but was intended to provide "a meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601. As the Act was a piece of consumer protection legislation focused on consumer credit transactions, exemptions were allowed for corporate debtors and individuals who secure credit for business or commercial purposes. These debtors were thought to be amply sophisticated to make informed judgments as to the value of alternative credit plans and to be able to negotiate beneficial credit terms, so as not to require the special disclosure protections provided by the Act. Hence, 15 U.S.C. § 1603 exempted "credit transactions involving extentions of credit for business or commercial purposes or . . . to organizations [defined to include corporations and partnerships]."

As discussed supra, the business or commercial purpose exemptions remain in full force with regard to the provisions of the 1968 Truth in Lending Act itself, and it has never been that application of these exemp-

tions which is at issue in the present case.

The 1970 and 1974 amendments to the Truth in Lending Act, which deal with credit card transactions, present a much more problematic situation when an attempt is made to reconcile them with the business and commercial exemptions of 15 U.S.C. § 1603. Judicial and administrative interpretations of the 1970 amendments, which sought to prevent the issuance of unsolicited credit cards, 15 U.S.C. § 1642, to limit to $50.00 the liability for the unauthorized use of a credit card, 15 U.S.C. § 1643, and to provide criminal sanctions for the fraudulent use of a credit card, 15 U.S.C. § 1644, concluded that the business and commercial exemptions provided by 15 U.S.C. § 1603 were inapplicable to the amendments. See, American Airlines, Inc. v. Remis Industries, Inc., 494 F.2d 196 (2d Cir. 1974), Federal Reserve Board regulation 12 C.F.R. 226.13(a)(4), (1973)(amended Nov. 2, 1972) now codified at 226.2(m), and a Federal Trade Commission decision, In re Credit Card Service Corp. d/b/a Credit Card Service Bureau, 82 F.T.C. 191, 209-11 (1973), affirmed and enforced sub nom. Credit Card Service Corp. v. Federal Trade Commission, 495 F.2d 1004 (D.C. Cir. 1974). These interpretations by Courts of Appeals, as well as by the Federal Reserve

Board and the Federal Trade Commission, construed the credit card amendments to the Truth in Lending Act as applicable to all credit cardholders, including corporations.

The conflict between the business exemptions of 15 U.S.C. § 1603 and the 1970 credit card amendments arises for two reasons. First, unlike other forms of credit transactions in which the potential corporate debtor, being in a better bargaining position than its consumer counterpart, may negotiate better credit terms, there is no distinction between the corporate and the consumer credit cardholder when faced with a standardized credit card application form. The use of form contracts for credit card applications, the Remis Court stated, makes the process "a take-it-or-leave-it method of contract formulation." 494 F.2d at 202. Secondly, there is no viable way of distinguishing between credit cards issued for "business purposes" and those issued for "personal use," since a credit card is often used for both personal and business transactions.

Petitioner argues that these cases have no application to this case, since they dealt with the 1970 amendments to the Truth-in-Lending Act, and not with the 1974 amendments. [Brief for Petitioner 24.]

Contrary to Petitioner's assertion, however, both the reasoning of these two cases and the analogous factual circumstances addressed by these cases are very much apposite to the case at bar.

Speaking of the application of the business or commercial exemption to the credit card amendment there at issue, the Remis Court wrote that such an application

> would raise a threshold question for which the Act at least provides no ready answer: at what point in the credit card process does the transaction involving the extension of credit occur? Since the likely response is at the time the credit card is issued, confusion would prevail over the classification of cards issued to natural persons. Were the cards issued for business or commercial use and thus excluded from protection, or were they for personal use and hence covered under [the amendment]?

494 F.2d at 201. The Remis Court considered a predominant use test as a possible solution, but concluded that "the extensive, overlapping use of some types of credit cards, e.g. to purchase gasoline or meals in a restaurant, would make this test wholly unwieldy in application" and would produce "needless uncertainty." Id. Furthermore, the Court reasoned that the application of the exemption to the credit card provisions "would replace the uni-

form safeguards demanded by the nature of the problem which Congress addressed with a crazy-quilt design of cardholder protection." Id. Clearly the needless uncertainty and unwieldy application of any "predominant use" test would be equally present if used in connection with the 1974 amendments as the Court thought it would be in the context of the 1970 amendments.

The Fifth Circuit discussed Remis in the context of the other possibility, to wit: a transaction involving the extension of credit occurs when the card is used. The Remis court concluded that the unauthorized use of a card is not an extension of credit to the cardholder. Id. at 201 n. 4. Whether the unauthorized user had a business or personal purpose should not determine whether $50 limits the cardholder's liability. For the same reason, the unauthorized revocation of a card at New Orleans International Airport was not an extension of credit. The nature of the transaction in which the unlawful revocation takes place can not determine whether or not the exemption applies.

The problem of identifying and categorizing the "credit transaction" for the purposes of exempting certain classes of credit cards was also discussed in Credit Card Service

Corp. v. Federal Trade Commission, supra. Again, although the case involved the 1970 amendments, the rationale used by the Court in rejecting a "predominant use" test is equally applicable to the 1974 amendments and the instant case. The Court wrote:

> Petitioner never explains why [15 U.S.C. §] 1603(1), which exempts certain "credit transactions" should apply to a particular class of credit cards. Of course, when an individual uses his card for business, that is a "credit transaction for business . . . purposes." But in such a case, the liability limitation does not come into play because there has been no unauthorized use. If, nonetheless, we assume that using a card for business purposes exempts an individual from the liability limitation, how long does that exemption last? Until the next time the card is used for a non-business purpose? Under this approach, liability would depend on how a card was last used before it was lost or stolen.

495 F.2d at 1007. Applying the Court's analysis to American Express' argument in the case at bar, a classification of the Respondent's card would depend upon how the card was last used before it was revoked. Such a method of classification is clearly untenable. The Court continued:

> Petitioner, of course, seeks to avoid this result. Its position seems to be that when a card is issued or used primarily for business, the card itself becomes "a credit transaction . . . for

> business . . . purposes." Thus the card is exempted from the statute by [15 U.S.C. §] 1603(1) even on those occasions when it is not used for business. We are unwilling to assume that a credit card can be transformed into a credit transaction in this fashion. [Emphasis in the original] [Footnotes omitted].

Id. at 1007-08.

The D.C. Circuit Court of Appeals continued its analysis in the following footnote:

> Nor can the transformation be achieved by arguing that when a card is issued for business, that is a "credit transaction involving the extension of credit for business. . . ." Credit is extended when a card is used, not when it is issued. . . ."

Id. at 1008 n. 21. The Court concluded that a "prospective predominant use" test, such as Petitioner in the instant case advocates, would "create practical difficulties." Said the Court:

> A credit card is often used for both business and personal transactions. Considerable litigation and uncertainty would result if courts had to determine if a card was issued "primarily" for business.

Id. at 1008.

As indicated by the excerpts quoted above, the Courts are in disagreement as to when the "credit transaction" in the credit card process actually occurs. While the Second Cir-

cuit Court of Appeals, in Remis, stated that the "likely response is at the time the credit card is issued," 494 F.2d at 201, the D.C. Circuit, contrary to the position of Petitioner [Brief for Petitioner 29], flatly refused to consider the issuance of the card as being the "credit transaction," stating that "[c]redit is extended when a card is used, not when it is issued." 495 F.2d at 1008 n. 21. Both courts concluded that applying the business exemptions to credit cards was improper or illogical. These courts reasoned that the only place where there might have been an extension of credit was at the time of the unathorized use. Similarly, there is no extension of credit at the time that the revocation takes place, and it would be equally improper and illogical to apply the business exemption, which applies to "extensions of credit" to an unlawful revocation.

Petitioner would argue that if the card is used for business or commercial purposes, then the amendments do not apply by application of 15 U.S.C. § 1603. The problem crystallizes particularly in the instances wherein the uses of the card are mixed, that is, when the card is used for both personal and business purposes.

The Act gives no clear answer as to how

such cards are to be categorized. Furthermore, the jurisprudence has clearly indicated the unwieldy and unworkable nature of a "primary use" or "prospective predominant use" test. As the Court in Credit Card Service Corp., supra, observed, much litigation and uncertainty would result if the courts had to make a determination in each case as to the "primary use" of the card.

The District Court in the instant case, contrary to the reasoning of the courts in Remis and in Credit Card Service Corp., fashioned its own prospective predominant use test. It based its judgment on its assumption that when an individual gets a credit card through his employer, the predominant use of that card will be for business purposes, whereas when an individual applies for a card on his own, the primary use of that card will be personal. Such an assumption is not only weak, but would also easily evaded. Large corporations with many traveling employees would merely have these individual employees acquire credit cards in their own names, then make contractual arrangements to reimburse employees for all business uses of the card (i.e. expense account reimbursement). In this manner all uses of the card would be brought within the coverage of the Truth in Lending

Act, even though the predominant use of the card was for business purposes. Conversely, the small businessman with no, or few, employees, who might acquire a credit card in his company name for reasons of convenience and economy, would not be protected by the provisions of the Truth in Lending Act, even though it is possible that the predominant use of the card would be for personal purposes. To allow such an unworkable test to govern the application of the 1974 Truth in Lending Act provisions on credit card transactions would be to frustrate the very purpose of the amendments -- the prevention of "high-handed tactics of card issuers in their handling of complaints [by consumers]." 444 F.Supp. at 341.

With regard to credit cards, the only courts to have considered the issue, supra, have uniformly held that any "purpose of use" or "predominant use" test for classifying a particular credit card as either business or personal is unwieldy and totally unworkable. The Courts have thus held that the amendments to the Truth in Lending Act which deal with credit card transactions were intended to apply to all credit card transactions, including business and commercial transactions.

2.

Inability to Use a Retroactive Determination

15 U.S.C. § 1666 should be applied to Respondent because the Truth-in-lending laws were not in effect at the time of the Koerner Application. In the absence, at the time of the application, of any distinction in the mutual performance of the parties involving business and personal use, the "predominant use test" or any variant would therefore have to fictionalize the intent of the parties.

Any retroactive determination of "predominant use" to the time in 1965 of the Application would be at best a guess and would clearly be an unfair, inappropriate, and legally unjustified post hoc method of arriving at a result.

3.

Lack of Subsequent Action by American Express

15 U.S.C. § 1666 should be applied to Respondent because the American Express Company made no attempt to ascertain whether or not the uses of its card issued to Mr. Koerner were for any purposes other than for personal uses, accepted personal funds from Respondent as late as September 2, 1976, and took no steps to restrict the use of the card to business purposes.

American Express earns money from the use of the credit cards that it issues. It earns

money for each transaction, and there is great rivalry among credit card issuers for volume of sales and substantial advertisement and encouragement of use to achieve such volume.

If a card were restricted to business uses or only the company cardholder was the obligor, this would mean a lesser volume of transactions resuling in the loss of earnings otherwise generated by transactions involving personal uses and the loss of transaction volume to consumer or unrestricted credit cards. The existence or non-existence of personal liability, of the protections of the Fair Credit Billing Act, and of meaningful disclosure of these factors may also become matters of competition between card issuers as to which issuer would provide a company card which could be used with all types of transactions rather than one restricted only to business or commercial transactions. See Credit Card Service Corp. v. Federal Trade Commission, supra. Such disclosure and competition would enable a cardholder "to compare more readily the various credit terms available to him and avoid the uninformed use of credit." [15 U.S.C. § 1601]

As can be seen from the prior discussion of the adminstrative letters, American Express was on notice that it should either comply

with the law, make disclosures, or ascertain for certain whether or not, in dealing with potential consumers, any credit transaction or series of transactions were indeed business or personal. Although it had notice of the risk, Petitioner choose not to comply with the law. Its actions were prompted by its own corporate purposes of maximization of earnings and of maintenance of competitive equality with card issuers who do comply with the law or who do not hold consumers liable on business cards. American Express should not now be able to claim that its choice and its result has distorted the fabric of commercial transactions.

While the Court of Appeals may not have wished to resolve the issue of whether corporate transactions and transactions for business or commercial purposes are protected by the 1974 amendments dealing with credit cards, a decision by this Court protecting individuals from unauthorized revocation of their credit cards is an appropriate solution in light of the difficulty of classifying credit cards as to their "predominant use" and on account of the absence of an extension of credit in card revocation situations. It is the individual consumer who is subjected to the harrassment and embarrassment which the amendments are designed to prevent.

The most clear-cut method of protecting the individual from such harrassment, in the absence of any viable test for classifying credit cards, is to apply the protections of 15 U.S.C. § 1666 to all cards.

It would seem as Petitioner should welcome such a test, as it eliminates the prospective uncertainty on the part of the credit card issuer as whether or not to comply in a particular case with 15 U.S.C. § 1666. See Public Information Letter of Jeraud C. Kluchman, dated July 18, 1974, No. 821, 5 CCH Consumer Credit Guide ¶ 31,338, discussed supra. The predominant use test invites violation, since the facts of predominant use by the cardholder would seldom if ever be within the knowledge of the issuer in the absence of a contractual provision.

VII. THE IMPACT ON CREDIT FOR BUSINESS ENTERPRISES WILL BE, AT MOST, MINIMAL AS A RESULT OF THE COURT OF APPEALS' DECISION

Finally, the American Express Company claims and would have the Court believe that the decision of the Court of Appeals will have a significant impact on credit for business enterprises. This is simply not the case. As indicated above, the holding of the Fifth Circuit is a very narrow one, limited only to the 1974 amendment to the Truth-in-Lending Act.

Thus, the effect on the majority of commercial credit transactions, such as loans to corporations, is non-existent, regardless of the practice of many lending institutions to require individual liability as security. These forms of credit transactions, easily prospectively classified as business or commercial in nature, remain untouched by the holding in the case at bar and are still exempted by 15 U.S.C. § 1603.

The sole credit transaction affected by the decision of the Court of Appeals is the credit card transaction in which an individual cardholder is signed as principally liable for personal and business debts incurred on the card. Henceforth it will be necessary for the credit card issuer to abide by the requirements of 15 U.S.C. § 1666 in correcting billing errors or settling billing disputes. The mechanisms for complying with the provisions of 15 U.S.C. § 1666 are already established for the millions of other consumer cardholders. The additional "burden" of providing notice of a problem, of providing an opportunity to explain billing and payment discrepancies, and of providing an opportunity to contest the revocation of a credit card, will be, at most, minimal. Complying with these provisions will mean that credit card issuers

will merely have to take the time to enclose some form of notice with the monthly bill and will have to listen to the explanation of a cardholder who has a discrepancy in his account statement. Certainly, such compliance is consonant with the purpose of the amendment -- to prevent the harrassment of consumers by creditors.

Alternatively, credit card issuers could restrict the use of certain credit cards solely to business use and delete consumer liability. E.g. Public Information Letter No. 1004, supra. Such a restriction should not work a hardship upon the credit card issuer, nor is such a restriction unusual.

Many lending institutions restrict the use of certain loans to business purposes and/or require a prior specific statement by the debtor stating that the credit extension is for business purposes. See e.g. Affidavit of Business Loan of Dauphin Deposit Bank & Trust of Harrisburg, a copy of which is annexed hereto as Exhibit A. Additional inquiry indicates that Hamilton Bank of Harrisburg, Pennsylvania, Broad Street National Bank of Trenton, New Jersey, and Colonial Bank of New Orleans, Louisiana also adhere to this obviously prudent commercial policy. By restricting the use of certain credit cards in

this same way, making disclosures and business/personal determinations in advance, the extension of credit by credit card issuers upon these cards could be easily categorized as for a business or commercial purpose, and thereby be exempted from the provisions of 15 U.S.C. § 1666, if this Court felt that the exemption should be applied.

In fact, a solution involving a restriction of this nature would clearly be in consonance with the administrative interpretations cited by Petitioner. Holders of credit cards restricted solely to business use would accordingly not be protected under the Fair Credit Billing Act. However, those cardholders whose cards are unrestricted and can be and/or are used for mixed purposes would still be granted protection against those practices against which the 1974 amendments were enacted. This is the very solution that American Express appears to suggest this as an alternative [Brief for Petitioner 29], but, of course, Petitioner would leave the post-violation determination solely to the issuer without notice to the cardholder, while the solution of a prior specific statement would require that the nature of the account and the consequences, if any, of a restriction to business use, be clearly spelled out.

Mechanically this should be no problem for the future, inasmuch as it is not unusual for issuers to change terms of credit cards issued by them, including the providing in such notice of the option of cancellation and return of the card. There are established credit and banking procedures and forms for such things as an increase in percentage of monthly finance charges and the imposition of a yearly card fee where none before existed.

In the same way, a business restriction on certain cards should not pose any serious burden upon the credit card issuers. The card applications and renewal forms would merely ask an applicant to specify the type of card for which he was applying and provide information as to the consequences of the choice on individual liability as a principal and on the applicability, vel non, of the Fair Credit Billing Act. Surely the certainty provided by card classification before issuance, clearly stated to the applicant, is preferable to the guesswork inherent in any "predominant use" test at the time of a problem or dispute. Additionally, judicial resources could be conserved by application of a clear rule instead of the unwieldy predominant use test, since the latter would often require judicial fact-finding to determine the actual predomi-

nant use of the card. A balancing of social costs and benefits clearly shows substantial benefit to be gained by the implimentation of such a rule at minimal cost to the credit card issuer.

CONCLUSION

The decision from which Petitioner appeals is one narrow in its scope. It does not limit the applicability of the business or commercial transactions exemption to the broad range of ordinary commercial credit transactions, but merely attempts to achieve the purpose of the 1974 Fair Credit Billing Act -- to prevent the harassment of consumers by creditors. The decision classifies natural persons who are liable as principals for both personal and business debts on their credit cards as consumers and thereby accords them the protections provided by the Act.

The facts of the present case argue strongly for the application of the 1974 amendments to the credit card in question. There was never any prior notification to John E. Koerner & Company or to Louis R. Koerner, Sr. from the American Express Company that the billing error was the cause of any problem, nor that the American Express Company was even considering the revocation of the card. The card was revoked unilaterally, without notice,

without an opportunity to explain, and without opportunity to contest. The unfairness and the embarrassment were maximized. Surely this is exactly the type of action which the provisions of 15 U.S.C. § 1666 were intended to correct.

The alternative to such a holding would require a test for determining the classification of credit cards according to their "prospective predominant" or "predominant" use. Such tests have been shown to be unwieldy and unworkable, creating needless uncertainty and considerable litigation. In addition, such tests are easily evaded by sophisticated businessmen, while laying a trap for the less sophisticated.

In the absence of a workable test for classifying credit cards as to their primary use, the decision provides a simple and straightforward test, which is non-technical and easily understood, and which can be applied in all situations with a minimum amount of difficulty. Credit card issuers, such as the American Express Company, which wish to retain the benefits of any business or commercial transactions exemption of 15 U.S.C. § 1603 could eliminate primary liability of the consumer, restrict the use of certain credit cards solely to use for business or commercial

purposes, and/or require a statement from the cardholder as to card use, a practice used in commercial loans to individuals.

Alternatively, this Court could hold very simply that the 1974 Amendments, as did the 1970 Amendments, apply either to all cards or to those portions of the Fair Credit Billing Act, as amended, that do not involve "credit transaction involving extensions of credit," such as that governing the correction of billing errors and card revocations, 15 U.S.C. § 1666.

For these reasons, Respondent respectfully prays that the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit in the instant case be affirmed.

Respectfully submitted,

LAW OFFICE OF LOUIS R. KOERNER, JR.

By:_____

Louis R. Koerner, Jr.
1204 Jackson Avenue
New Orleans, Lousiana 70130
(504) 566-0546

CERTIFICATE

I hereby certify that a copy of the foregoing pleading has been served upon all interested counsel, by placing a copy of the same in the United States Mail, postage pre-

paid and properly addressed, all on this _____ day of March, 1981.

_____

Louis R. Koerner, Jr.

AFFIDAVIT OF BUSINESS LOAN

COMMONWEALTH OF PENNSYLVANIA)
) SS.
COUNTY OF)

_____, being duly sworn according to law, deposes and says that he is the _____
owner, proprietor, general partner

of _____,
Name of Business

that he is authorized to make this affidavit on its behalf; and that the loan or extension of credit from Dauphin Deposit Bank and Trust Company as evidenced by an instrument dated _____, 19 ____ is for the business purpose of _____.

_____

Sworn to and Subscribed before me
this _____ day of
_____, 19 _____.

_____
Notary Public

My Commission Expires:

L-85 (3-75 - Name Revision 9-78)